witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

And later at page 61 his Lordship said this:—

"In this kind of case it is very rarely that an appellate court is justified in reversing the decision of the trial judge who has had the opportunity of seeing and hearing the witnesses. . . ."

Another ground of appeal pointed out that the judge was wrong in concluding that the school building was handed over to the respondents on 21st September 1970 instead of on 28th June 1970. Here again the decision had to be made purely on the question of credibility of witnesses.

I do not propose to deal with the other grounds which in my view are also against finding of facts made by the judge on credibility of witnesses. I would therefore dismiss the appeal.

Since my brother judges sitting with me have concurred with my judgment, the appeal is therefore dismissed with costs. The deposit of $500 will be paid to the respondents on account of their taxed costs.

Gill and **Ali F.JJ.** concurred.

Appeal dismissed.

SONG TOH CHU v. CHAN KIAT NEO

[F.C. (Azmi L.P., Gill and Ali F.JJ.) November 21, 1973]
[Kuching — Federal Court Civil Appeal No. 13 of 1973]

Contract — Building contract — Agreement for land to be developed and for it to be sold to developer — Sum paid "by way of deposit and in part payment of agreed purchase price" — Failure of purchaser to apply for subdivision of land and to carry out his part of the bargain — Whether vendor can apply for rescission of contract and for forfeiture of deposit.

The respondent was the owner of a piece of land and she had entered into an agreement with the appellant whereby the major portion of the land was to be transferred to him and he was to develop the land. The appellant paid a sum of $20,000 "by way of deposit and in part payment of the agreed purchase price". The appellant failed to carry out his part of the bargain and he did not apply for subdivision of the land. The respondent then applied for a declaration for rescission of the agreement and for an order that the deposit of $20,000 be forfeited to her. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

Held: in the circumstances as the contract had failed by the default of the appellant, the respondent was entitled to retain the deposit.

Case referred to:-

(1) *Collins* v. *Stimson* 11 Q.B.D. 142 at p. 143.

FEDERAL COURT.

Ee Poh Teck for the appellant.

Loke Yik Ping for the respondent.

Azmi L.P. (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): Madam Chan Kiat Neo was the owner of a piece of land in Kuching, Sarawak. It is about 1.66 acres in area. On 13th March 1969 she entered into an agreement with a building contractor named Song Toh Chu, and the relevant provisions of the agreement may be briefly stated as follows. She agreed that her land be sub-divided into 19 building lots. She was to retain 5 lots and the remaining 14 lots were to be transferred to the building contractor. These 14 lots were valued at $196,000. When the agreement was signed, Mr. Song deposited $20,000 with her "by way of deposit and in part payment of the agreed purchase price." As to the balance of the purchase price Mr. Song was to settle it by building 5 houses on her 5 lots, namely 3 double storey terrace houses on 3 lots and 2 double storey semi-detached houses on 2 lots. The transfer of the 14 lots to Song was, however, to be made in stages. For example, 2 lots were to be transferred when the reinforced columns on the ground floor of the 5 houses were completed, 2 more lots to be transferred when the reinforced columns on the top floor were completed and so on, until finally the remaining 4 lots would be transferred to Song when he delivered to her the said 5 houses, complete with fencing and sanitary installations. Time was, however, made of the essence of the agreement. Under clause 6 of the agreement Song was to apply within one month of the signing of the agreement to the Land and Survey Department of Kuching on behalf of Madam Chan for the sub-division of the land as agreed between them, and she undertook to sign any necessary papers for that purpose. Immediately after such approval had been obtained, then Song would submit and obtain approval of the relevant building plans, drawings, etc., from the Kuching Municipal Council. Within 12 months from the date of the approval, Song must deliver the 5 houses together with their certificates of fitness for occupation to Madam Chan.

The agreement also made provisions for breaches of the agreement by any of the parties. For example, under clause 18, if Song should fail to complete the 5 houses and deliver them to Madam Chan within 12 months from the approval of the plan as provided in clause 8, then Song shall pay interest on $176,000 at the rate of 6% per annum until the delivery of the houses to her.

Under clause 19, however, it is provided that "if for any reason (Mr. Song) fails to deliver the said houses to (Madam Chan) within the period of 10 months after the due date of completion of construction, then the deposit and/or any part payment of the said purchase price paid therein by (Mr. Song) shall be forfeited to Madam Chan as pre-estimated damages and thus this agreement shall *ipso facto* become null and void and thereafter Mr. Song shall not be entitled to claim against Madam Chan for the cost of construction work carried on by Mr. Song on the said land."

Under clause 20, however, if for any reason Madam Chan should fail to do her part in transferring the sub-divided lots to Mr. Song then she must return the deposit or any other payment she received from Mr. Song and for the cost of construction and in addition will also be liable for unliquidated damages. If, however, the Land and Survey Department should refuse to approve the sub-division then both parties agree to treat the agreement as null and void, in which event Madam Chan must pay back the deposit.

Mr. Song failed to carry out his part of the bargain. He did nothing as a matter of fact apart from paying the deposit of $20.000. He should in the first place apply on behalf of Madam Chan for the sub-division of the land under clause 6 of the agreement. He had not even done this. On 17th June 1970

Madam Chan's lawyers brought the attention of Mr. Song to this fact by letter. They did not receive any reply. They wrote again on 25th June 1970. Again there was no reply. So finally on 11th January 1971 she filed a writ with the statement of claim. She asked for a declaration for rescission of the agreement and for an order that the deposit of $20,000 be forfeited to her.

The defendant filed his defence in which he admitted failing to apply to the Land and Survey Department on behalf of the plaintiff for sub-division of the land but denied that for failing to do so Madam Chan could forfeit the deposit. He also counterclaimed for the rescission of the contract and refund of the deposit. At the trial neither party gave evidence and agreed to rely on their pleadings and arguments. The learned trial judge gave judgment in favour of Madam Chan. Mr. Song appealed to this court.

The argument of Mr. Ee on behalf of Mr. Song before the court below and as before this court was substantially to this effect. He drew our attention to clause 19 of the agreement. He suggested that the fact that the forfeiture provisions were inserted in that clause should raise a question as to whether it was the intention of both parties that the deposit would be forfeited for a breach under clause 6. He went on to argue that a breach under clause 6 was of such a minor importance that a forfeiture of $20,000 for it would be in the nature of a penalty and most unconscionable. He maintained that it was clearly the intention of the parties that the deposit would only be forfeited if clause 19 has been breached. There can be no doubt that under clause 19 that the deposit was to be forfeited "as pre-estimated damages" if for any reason the building contractor should fail to deliver the said houses "within 10 months after the due date of the completion of the construction." He went to say that the occasion for forfeiture could only therefore arise after the actual construction had begun but has not been delivered within 10 months after the due date of the completion of the construction. And the due date of completion would appear to be under clause 8 within 12 months after the plans had been approved by the Kuching Municipal Council.

It is quite clear also that under clause 18 Madam Chan could instead of rescinding the contract claim 6% interest calculated on the sum of $176,000 until the delivery of the houses. But she elected to rescind the contract. In my view there must be clear evidence in each case that the contract taken as a whole shows an intention to exclude forfeiture except in the circumstances described in clause 19. In my opinion, however, there is no such evidence in this case and since the contract had failed by default of Mr. Song, Madam Chan would be entitled to retain the deposit. As Pollock B. had said in *Collins* v. *Stimson*: —[1]

"According to the law of vendor and purchaser the inference is that such a deposit (the deposit referred to by his Lordship was a deposit of 10% made by the purchaser) is paid as a guarantee for the purpose of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit."

Again at page 144 his Lordship went on to say:—

"The claim to the deposit as forfeited is not a claim to a penalty but a claim to damages for breach of the agreement which the parties have settled at a fixed sum."

It is true that in the instant case that sum is not fixed for a breach under clause 6, but since the amount is about 10% of the whole price it would appear to be a reasonable amount. I would therefore dismiss the appeal.

Since my brother judges sitting with me have concurred with my judgment, the appeal is therefore dismissed with costs. The deposit of $500 will be paid to the respondent on account of her taxed costs.

Gill and **Ali F.JJ.** concurred.

Appeal dismissed.